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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 641

WILLIAM D. HALL,

Petitioner,

vs.

NATIONAL FARMERS ORGANIZATION, INCORPORATED,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

LEE D. SINCLAIR,
1730 K Street, N. W.,
Washington, D. C. 20066,

ALAN W. BOYD,
JAMES A. McDERMOTT,
1313 Merchants Bank Building,
Indianapolis, Indiana 46204,
Attorneys for Respondent.

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis, Indiana 46204,
Of Counsel.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

STATEMENT OF THE CASE.

Petitioner's statement of the case is a mixture of statements purporting to be factual, which are actually only arguments made and rejected in the courts below, assumptions as facts of matters which are either completely unsupported by the record, or with respect to which the evidence was conflicting, inaccuracies, and omissions of material matters. The result is a picture so completely distorted, even to the extent that it has a factual basis in the record, that it cannot be adequately corrected by a mere statement of errors and omissions. Since petitioner's

statement of the questions presented and his asserted reasons for granting the writ are predicated upon the distorted picture so presented, a complete restatement of the case is necessary in order to present the true picture.

Nature of the Pending Action.

The merits of the pending action are, of course, not involved in the present proceeding, but it is necessary to identify the issues there involved in order to determine whether it embraces matters substantially related to a subject-matter of petitioner's former representation of respondent. That action was brought against respondent by six named individuals represented by petitioner, one of whom subsequently withdrew [R. 3][1], seeking a declaratory judgment and injunction. The complaint was in three paragraphs [R. 5-21], each of which alleged that plaintiffs were members of respondent, a not-for-profit corporation organized under the laws of the State of Iowa, holding itself out as acting under and by authority of the Capper-Volstead Act in functioning as a service corporation for its members in entering into collective bargaining agreements with processors and other buyers throughout the United States for the sale of ther farm commodities and other produce.

Respondent is alleged to have entered into contracts with various processors denominated master contracts, in the form shown by *Exhibit F* of the complaint, for the sale of such commodities. Each such contract provides that respondent (hereinafter sometimes referred to as "NFO"), is offering the same form of contract to other processors, and that none of said contracts will become effective until 30 days after respondent has advised the processors who have executed such contracts, that like contracts have been

1. Record references are to the original district court record unless otherwise stated.

signed by other processors, who have either processed, or contracted to process, at least 60% of all the particular commodity processed in the United States or in particular areas thereof during the prior three-year period. The membership agreement, a copy of which is attached to the complaint as *Exhibit E,* provides among other things that "No contract consummated with a processor shall be effective or binding until it has been ratified by a two-thirds vote of the members in the particular marketing area who have signed contracts with NFO for the commodity, attending a meeting called for that purpose by the Marketing Area Bargaining Committee, and has been approved by the Board of Directors of the NFO." Petitioner correctly states that no processor contracts have gone into effect.

Each master contract includes the following provisions:

> "15. For acting as a procurement agent for Processor and for performing further services under this contract, Processor shall pay to the N. F. O. within a ten (10) day period after each month's final settlement with N. F. O. producers, an amount equal to five per cent (5%) of the purchase price of (the commodity involved) received from N. F. O. members. One-half of one per cent (½ of 1%) paid by the processor for services rendered shall be used as determined by the N. F. O. National Board of Directors for promoting the sale of * * * (the commodity involved)."
>
> "16. Disposition of the balance of funds paid for services rendered, will be determined by the special national convention of N. F. O., to be held prior to the ratification of the first N. F. O. contract."

The complaint seeks a declaratory judgment that both the master contracts and membership agreements are unlawful, and an injunction preventing respondent from either carrying out contracts already entered into, and or entering into further similar contracts. The first paragraph charges that the foregoing provision for the 5%

payments violates Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. §13c.

The second paragraph alleges that the processor and membership agreements violate the Sherman Act because respondent is precluded by the Iowa statute under which it is organized and its Articles of Incorporation, from paying dividends or distributing any part of its property to its members prior to dissolution. It asserts that such prohibition will preclude distribution to members of any part of the 5% payments to be made by the processors, and that consequently respondent does not qualify for the immunities from the antitrust laws granted by Section 6 of the Clayton Act (15 U. S. C. § 17), and Section 1 of the Capper-Volstead Act, because it is not an association operated for the mutual benefit of the members thereof, as such producers, within the meaning of Section 1 of the Capper-Volstead Act. All of respondent's processor and membership contracts are claimed to violate the Sherman Act because it does not qualify for such immunities.

The third paragraph alleges that the processor contracts, when activated, will constitute NFO and the processors an unlawful combination in violation of the Sherman Act because even if respondent is otherwise entitled to the immunities granted by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act, the contracting processors are not producers of agricultural products, and consequently are not entitled to the benefit of such immunities [R. 5-21].

At the time of filing its answer [R. 22-42], respondent filed a verified motion to disqualify petitioner from further participation in the litigation [R. 2 (65-71)], on the ground that he had been employed by respondent as its general counsel from October, 1964 to October, 1965, and in connection with such employment had advised, counseled and rendered professional services to respondent in connection

with the same master contracts and membership agreements and other related matters, which are the subject-matter of the pending action.

Petitioner filed a verified answer with various documents and affidavits attached [R. 72-91 (20-182)]. Respondent thereafter filed numerous counter-affidavits in support of its motion [R. 93 (1-183)]. Various supplemental affidavits and exhibits were subsequently filed by the petitioner [R. 94, 98-111, 140, 141].

Proceedings With Respect to the Motion

The District Court after two hearings [R. 2, 3] found petitioner, his law firm and all counsel in partnership or association with him or his said law firm disqualified from further participation of any nature as counsel for the plaintiffs in this cause and entered an order enjoining such further participation [R. 114]. The Court of Appeals granted leave to appeal [R. 128, 129] and affirmed the order,[2] stating that in its opinion the order was supported by the record herein, and the law appertaining thereto, and that the rationale of *Consolidated Theatres* v. *Warner Circuit Management Corporation*, 2 Cir. 1954, 216 F. 2d 920, *Cord* v. *Smith*, 9 Cir. 1964, 338 F. 2d 516, and *T. C. Theatre Corp.* v. *Warner Bros. Inc.*, D. C. S. D. N. Y. 1953, 113 F. Supp. 265, was dispositive of the controlling issue presented for determination, the record before the District Court having disclosed that the matters embraced within the pending suit are closely and substantially related to a subject-matter included within the petitioner's representation of National Farmers Organization, Incorporated (Pet. App. I).

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2. Respondent has no copy of the Court of Appeals record. Page references herein are to the original paging of particular matters assumed by respondent to be included therein.

Petitioner's Version of the Facts With Respect to His Former Representation of Respondent.

Petitioner's version of the facts with respect to his former employment by respondent as stated in his petition herein, stripped of nonessentials, is substantially as follows (P. 8, 9):

He was employed in August, 1964 on a case by case basis to defend respondent and its members in many injunction and damage suits growing out of meat holding actions which he states involved about 95% of his efforts. During his employment he began to suspect that there were very serious problems with respect to respondent's legal structure, and voluntarily, on his own initiative, and without any request, promise of pay, or knowledge of respondent's officials, researched and uncovered "from public documents" all matters which are the subject of the pending action. Several months later, he was attempting unsuccessfully to meet with the directors to inform them of what he had "uncovered." Finally in September, 1965, the president and executive committee "admitted" that they already knew about such problems and criticized petitioner for "uncovering" them because they said they had not employed him to do so. Petitioner submitted a bill including what he states to be "part of my research time." At first respondent's representatives objected to paying for his time and research on the ground that he had not been employed to do the work, and he agreed to deduct the charge from his bill, but the next day, before he had an opportunity to do so, he was informed that respondent's representatives had changed their minds, and the original amount was paid as billed. Thereafter on November 10, 1965, he resigned for the stated reason that he was aware that he was not going to be able to inform the directors "of the gigantic fraud that was being perpetrated upon the

entire membership; and was convinced that the officials were not going to do anything about it."

The foregoing statement is singularly devoid of record references (P. 8, 9). The record contains other versions of the petitioner with respect to the same matters (Verified answer to respondent's motion to disqualify, R. 72-92; Petition for Leave to Appeal, pp. 5-11; petitioner's letter to the Legal Ethics Committee of the Indiana State Bar Association requesting an opinion [R. 93 (161-164)].

The Facts Shown by the Record With Respect to Petitioner's Former Employment.

Respondent does not challenge the statement that petitioner's principal, and possibly sole, activities at the time of his initial employment were concerned with the defense of certain injunction suits arising out of a holding action. But not later than October 1, 1964, he became respondent's general counsel. Despite his denials in his verified answer to the motion to disqualify [R. 72-92 (2, 3)], that he was ever general counsel, the record contains numerous letters written by petitioner beginning in October, 1964 [R. 93 (40, 41, 43, 61, 73, 74, 141, 142, 143)], in which he refers to himself as general counsel for respondent without qualification or limitation of any character. These letters show that he was introduced as respondent's general counsel at its 1964 national convention and addressed the meeting in that capacity [R. 93 (61, 73)]. Parts of his speech were quoted in various newspaper articles, including the New York Times Service Report. The articles referred to him as "NFO's general counsel" or "new general counsel for NFO." [R. 93 (45, 46, 58).]

Shortly after his resignation on November 10, 1965, petitioner met with Lee D. Sinclair who had been employed as general counsel for respondent in September 1965, to

become effective October 1, 1965 [R. 93 (116, 117)], and discussed with him all of the various matters which later became the subject-matter of the pending action [R. 72-92 (17), 93 (118-138)] [P. 10]. In a subsequent letter to Mr. Sinclair, dated December 20, 1965, discussing such matters at length, petitioner said:

> "I know that in your position as *new* chief counsel for NFO, it is not only your right but your *duty* to learn as much as you can on these problems." [R. 93 (118-138)].[3]

Later, on July 6, 1966, in a letter to the Legal Ethics Committee of the Indiana State Bar Association requesting an opinion as to whether he could ethically bring the pending action, petitioner said [R. 93 (161-164)]:

> "The legal opinion that I made reference to in the letter was written on December 20, 1965, to *my successor,* as counsel for NFO. This opinion was twenty-one single-spaced pages. It encompassed several different facets of NFO's legal structure which I feel should be corrected while there is still time before the master contracts are activated. I supported my opinion with case law and state and federal statutes."

In argument to the District Court and the Court of Appeals petitioner attempted to explain the document references with respect to his status as general counsel by asserting that in each instance he meant only that he was "general counsel in charge of the injunction suits" and so referred to himself both in his petition for leave to appeal (Memorandum attached to the petition for leave to appeal, designated Exhibit F (p. 1), and in his petition for certiorari in this Court (p. 16)). Neither of the courts below was required to accept the explanation in the face of the relevant documents and various other matters hereinafter referred to bearing on petitioner's credibility.

3. All emphasis is respondent's unless otherwise stated.

While his status as general counsel has a definite bearing on the scope of his former employment, the record further shows it involved specific matters substantially related to the subject-matter of the pending action. Respondent's counter-affidavits show in substance the following:

Regardless of petitioner's activities prior to early April 1965, he was asked at that time to investigate certain legal aspects of a memorandum which the Grain Commodity Department was proposing to issue. In order to give him the necessary background, it was necessary for him to be informed as to all aspects of the program, and as a direct result, he was asked to give an opinion with respect to the legality of all of the master contracts, including meat and dairy products as well as grain. For this purpose he discussed with the heads of the various departments, variout matters pertaining to respondent's collective bargaining and marketing operations which involved matters regarded by respondent's representatives as confidential. At no time during these discussions did petitioner express to respondent's representatives any doubt as to the legality of any part of the operation or the master contracts [R. 93 (98-102, 107-108, 113)].

During May 1965, the dairy products department was negotiating with representatives of Akron Milk Producers Association with respect to entering into a master contract for milk. A question was raised as to the legality of the proposed contract and the NFO representative stated that he would arrange a meeting between its general counsel and representatives of the milk association to discuss the matter. The meeting was held at Akron, Ohio, on May 26, 1965. Petitioner was introduced as respondent's general counsel and insisted that the master contracts were entirely legal [R. 93 (103-110)]. The supporting affidavits in the record with respect to the Akron meeting include not only those of representatives of NFO, but the affidavit of

one representative of the Milk Producer's Association and a letter of another such representative [R. 93 (103, 105, 106)].. About June 5, 1965, he advised respondent that with certain modifications, the grain memorandum would be satisfactory for use [R. 93 (99, 102)].

On June 29, 1965, an opinion letter of a Michigan law firm to one of its clients advising that a proposed master contract with respondent for edible beans was illegal, was forwarded to petitioner by the Chairman of respondent's Grain Commodity Department with a letter requesting petitioner to prepare a letter "in which you set forth *the basis of your reasoning* that all of the NFO Master Contracts are legal whether the contracts pertain to meat, dairy or grain products." [R. 92 (104-110) 93 (99-101).] The record contains nothing as to how or when the opinion letter of the Michigan firm came into the possession of respondent. There was no answering letter from petitioner, but shortly thereafter, representatives of NFO learned for the first time that he was taking the position that he had changed his mind about the legality of the master contracts, and desired to meet with the Board of Directors to explain his position [R. 93 (100, 102, 108)]. At the August meeting of the Board of Directors held August 9 and 10, 1965, it was reported to the Board that Hall had had one or more recent telephone conversations with officers and department heads of NFO in which he had expressed the opinion that the membership agreements and master contracts violated the antitrust laws, and had requested a meeting with the Board. The officers and heads of departments were instructed to meet with petitioner, hear what he had to say, and report to the Board. At the same meeting the Board adopted a resolution that Lee D. Sinclair, a member of the Trial Staff of the Federal Trade Commission, be contacted with a view to his becoming the new general counsel for respondent if satisfactory arrangements could be worked out [R. 93 (114)].

On August 21, 1965, following the meeting of the directors, the president of NFO wrote petitioner a letter to which petitioner attempts to attach significance with respect to the scope of his employment with NFO [R. 93 (81-82)]. It was a reply to a letter of petitioner of August 11, 1965 [R. 93 (102)], in which petitioner stated that after his original approval of the proposed grain matter he had expressed the view by telephone that it could not legally be followed, and that he wanted to go on record against using it until he had met with the Board of Directors to explain his views. The president's letter of August 21, 1965, stated that after rceeipt of Hall's letter of approval, representatives of NFO had been in Washington and found legal complications involved in the use of the memorandum, as a result of which the program had been greatly revamped. The president also stated that he was glad that petitioner had reconsidered his earlier contrary recommendations as to the memorandum, but that he need not be concerned with the matter any further, although he could proceed on the remaining cases arising from the holding action as he had been doing. The letter was written after the Board had initiated the employment of a new general counsel [R. 93 (114)]. While it definitely limits Hall's subsequent activities, it affords no basis for the inference he seeks to draw that it is an admission that his prior employment had been limited to the defense of such actions.

Hall's meeting with the Executive Committee of NFO, which had been authorized as aforesaid, took place on September 22, 1965, at which time Hall discussed his views as to the legality of the membership agreements and master contracts, various other matters relating to what he claimed to be legal defects in respondent's structure, and presented a bill for services, including his research with respect to such matters. His answer to the motion to disqualify states

that respondent objected to paying for these services and that *he deducted an agreed amount from his statement,* which was attached to his answer as Exhibit N, and *submitted the rest of the statement for payment* [R. 72-92 (11, 111)]. Respondent's counter-affidavits denied that the amount of the bill as submitted had ever been objected to and stated that it was paid in full. This was supported by documentary evidence [R. 93 (1-3, 96-97)]. In his Petition For Leave To Appeal to the Court of Appeals (p. 10), petitioner stated that the NFO representatives objected to paying his bill, but changed their minds the next day and "paid for copies of my research material before I returned to my office in Indianapolis." In his letter of July 6, 1966, to the Legal Ethics Committee of the Indiana State Bar Association he said merely "I presented NFO with a bill for these services and they were paid." [R. 93 (163).] The statement in the Petition (P. p. 9) that NFO objected to paying him an additional $1,000 submitted with other fee statements for part of his research time, that he agreed to deduct the charge, but was unable to do so because the office personnel to whom the bill had been given for processing had gone home, and that the next day the NFO representatives had changed their minds and paid the bill before he had an opportunity to make the deduction, appears for the first time in his Petition for Certiorari without any record reference (P. p. 9).

The discussion of petitioner's legal views at the meeting of September 22, 1965, was reported at the September meeting of the Board of Directors held September 27 and 28, 1965. At that time arrangements had been completed for Mr. Sinclair to become general counsel as of October 1, 1965, and the Board concluded that all questions with respect to the legality of the master contracts should be submitted to him for his consideration and opinion [R. 93 (114, 115)].

The form of bill rendered by petitioner for these services was:

> "Research * * * *Grain matter, contracts,* etc. * * *" [R. 72-92 (111)].

In his answer to the motion to disqualify petitioner stated that while employed by NFO he was asked to do some work on a proposed grain memorandum, but that it was unrelated to the master contracts, and not substantially related to the issues in the pending action [R. 72-92 (6)]. In the petition for leave to appeal to the Court of Appeals (p. 7) he stated: "The chairman of the grain commodity department asked me to check into *the tax ramifications in connection with a certain grain memorandum* which was to be distributed to local grain elevators and their members. However this was wholly unrelated to the issues in this case." In the petition in this Court, the only mention of the grain memorandum is in connection with petitioner's discussion of his "resignation letter" of November 10, 1965 (p. 17) which is hereinafter set forth.

At the time Mr. Sinclair became general counsel it was understood that petitioner would continue to handle the pending injunction suits [R. 93 (116)]. Apparently he became dissatisfied with that arrangement and on November 10, 1965, wrote what he refers to as his "resignation letter." In said letter, addressed to the president and board of directors of respondent, he said in part [R. 93 (90, 91)]:

> "Several months ago I was asked to check into *certain legal phases of a grain memorandum, along with the possible tax implications. My checking led me* into a history of N. F. O.; an examination and analysis of the statute under which N. F. O. was incorporated, its corporate papers, its membership agreement and master contracts; the federal income tax laws; and federal legislation on anti-trust laws and violations thereof.

"*After completing this assignment,* I reported to Mr. Staley and the Executive Committee that, in my opinion, the statute under which N. F. O. was incorporated was the worst in the country for N. F. O.'s purposes after it embarked upon the collective bargaining program; that N. F. O.'s Articles of Incorporation did not comply with statutory requirements; that the membership agreement and master contracts were illegal and therefore unenforceable by either side; that the master contracts violated Section 2-C of the Robinson-Patman Act; that N. F. O. would be placed on a for-profit basis for income tax purposes; and that the 5%, which members I have talked to expect a return of when the master contracts are activated, cannot be returned to them. I supported my opinions and recommendations on each of these problems with state statutes, federal laws, attorney general opinions, case laws, and other authorities in a 173 page research file, copies of which were submitted for your consideration.

"Since it is my opinion that the legal problems will strike down or seriously damage N. F. O.'s efforts after the master contracts have been activated, I feel that appropriate changes should be made now while there is still time. Each of my assertions were denied and recommendations not followed. I was instructed not to concern myself further with these problems as N. F. O. had been checked by experts in Washington and was alright legally speaking. * * *

"*Notwithstanding my record of success for N. F. O., there is a sharp disagreement between us as to N. F. O.'s legal status.* Since my advice will not be followed, there is no need for me to continue representing N. F. O., as it now stands. Even though I have fought hard and will continue doing so for our farmers in trying to solve their problems, I do not want it said that the disaster I feel is coming was caused as a result of my failure to give them proper legal guidance.

"I am returning the pending suits against N. F. O. in a separate mailing. I will withdraw my appearance from all of these pending suits on November 29, 1965.

I will be happy to make available to new counsel all information on these pending cases in my posssession upon written request."

Several months later, in his letter to the Legal Ethics Committee of the Indiana State Bar Association, dated July 6, 1966 [R. 93 (164)], petitioner made the following statement:

> "I should add that the president asked me when I was counsel for NFO to give an opinion with regard to a tax question. *In the process of answering the tax question* and *having concern for the matters involved, I did come up with the problems that I found to exist*, and what I thought should be done to make the changes while there was yet time. I presented NFO with a bill for these services and they (sic) were paid. I submitted approximately 167 pages of rough research with these viewpoints, notes and cases to the officers of NFO."

NFO's president, by a letter dated November 19, 1965 [R. 72-92 (100), R. 93 (92)], replied to petitioner's "resignation letter." Petitioner apparently attaches significance with respect to the scope of his prior employment to the statements in the reply that "We accept your termination of services as an *attorney* for NFO", and "I sincerely regret that you have found it necessary to terminate your employment because I do feel that you could still be of value to the organization in some matters on which you have had experience." But admittedly there was a new general counsel at the time, and the only matters petitioner was then handling were the injunctions suits.

Petitioner also states (pp. 9, 10) that he made a subsequent attempt to reach the Board of Directors by a letter dated November 22, 1965 [R. 93 (93)], in which he offered to present his views and legal authorities and "those who are supposed to disagree could submit his or their reasons

and legal authorities, point for point, to show where I was wrong." This was a curious request since petitioner had met only three days earlier with NFO's new general counsel to whom the questions had previously been referred, had explained his views, and given his successor a copy of his "resignation letter" and legal memorandum for further study [P. 10, R. 93 (117, 118)]. Under the circumstances respondent could scarcely be expected to be willing to hold a debate between its deposed general counsel and its new general counsel to whom it was then looking for advice. The offer was refused [R. 93 (94)], with a statement by the president that he saw no reason for any further communication or contact between petitioner and NFO, its officers, directors and members. In this connection it should be noted that petitioner, commencing on the day of his resignation letter, had initiated meetings with various individual members of respondent in an attempt to put pressure on the directors to obtain an acceptance of his views, in which he stated that he expected to be legal counsel for NFO at some time in the future *after there had been a change of management* [R. 93 (144-148)].

On May 23, 1966, more than six months after his employment by respondent had terminated, petitioner wrote a letter to respondent reporting that he had continued in a case as attorney for the plaintiff, involving the expulsion of a cooperative creamery from membership in an association because it had signed a master contract with NFO. He had previously been employed by NFO in the matter because of a threat to join it as a defendant which had never materialized [R. 93 (95)]. He said in the letter:

> "The expulsion occurred solely because Benson signed the N. F. O. master contract. It necessarily followed that the lower court would make comments, observations and rulings in connection therewith.
>
> "I have not forgotten your pointed request that there be no further communication with N. F. O. in any

respect. However, *since I was once employed to represent N. F. O.'s best interest in connection with that contract*, I consider it a *professional duty* to offer to review with N. F. O. those matters which I propose to file in the Supreme Court concerning it. While representing the best interests of my client, *I still wish to give every consideration for the best interests of N. F. O.*"

The record also contains the entire correspondence file of the Indiana State Bar Association in connection with its opinion letter [R. 93 (160-183)]. In the light of Hall's protestations that he is acting solely for the good of NFO and its membership, it is at least of interest to note that that file includes a letter to petitioner from a member of respondent, asking him to represent certain members in litigation against respondent, which was stated to be the basis of his request for the opinion. It contains the following statement [R. 93 (167)]:

"As I stated this is more or less a labor of love until we can get a going NFO organization into operation, at which time the agricultural business of the NFO Centrol Office which will be handling brillions (sic) of dollars worth of paper work will need a tremendous staff of legal advisors and *who better to head that legal staff, than those individuals who spent time, effort and money in revitalizing the organization?*"

II.

SUMMARY OF ARGUMENT.

A. FIRST ALLEGED QUESTION.

Whether petitioner's research concerning the matters involved in the pending action was voluntarily initiated by him, or was the result of a specific assignment by respondent, is immaterial since it is undenied that he counseled with and advised respondent with respect to such matters, rendered a bill for such services, and was paid therefor. There is no principle of law that a lawyer is free to accept adverse employment if his advice is not followed.

The record contains abundant evidence, including petitioner's written admissions that his employment by respondent included legal services with respect to matters substantially related to the subject-matter of the pending action and even where evidence is conflicting, when the courts below have concurred in the finding on successive examinations of the record, it will be accepted by this Court unless shown to be clearly erroneous.

B. SECOND ALLEGED QUESTION.

Applicability of the rationale of the cases cited in the opinion of the Court of Appeals does not depend upon their factual similarities to this case. That rationale is that where any substantial relationship is shown between the subject-matter of the former representation and that of a subsequent adverse representation, the latter will be prohibited without more. In applying that principle the conduct of the former attorney should not be weighed with hair-splitting nicety. There are no exceptions to the principle that the attorney should "abstain from all appearance of evil."

Petitioner's prior representation was that of attorney for respondent, not its individual members. Respondent is the legal representative in the pending action of its members other than the dissident members. As a matter of constitutional necessity the pending action would not even be a justiciable controversy if it did not involve the legal relations of persons having adverse legal interests.

This is not a case where the former attorney for a corporation is attempting to recover assets for the corporation, or to recover against officers or directors for wrongs to the corporation. Whatever the rule may be in such cases, it cannot apply here.

C. THIRD ALLEGED QUESTION.

No claim of fraud was made prior to the filing of the motion for disqualification. Prior to that time petitioner at all times referred to the matters now claimed to compel or justify an inference of fraud as legal disagreements. Even if the claimed exception exists, which respondent denies, no inference of fraud is either compelled by, or properly inferrable from, the record.

Even under circumstances where the former attorney is permitted to disclose confidential information in order to prevent crime or fraud, his obligation not to accept adverse employment in respect to matters regarding which he was previously retained continues. Termination of the obligation to keep the client's confidences for whatever reason does not terminate an attorney's obligation of *fidelity* to the client, his obligation *to his profession not to dishonor it,* or his obligation *to the administration of justice not to bring it into disrepute.* All of the foregoing obligations are violated when the attorney places his services at the disposal of his former client's adversary in respect to matters regarding which he was previously retained professionally, even where his obligation not to disclose his client's confidences may have terminated.

III.

ARGUMENT.

A. FIRST ALLEGED QUESTION.

The first question petitioner claims to be presented for review is stated in the petition to be

> "Whether the matters embraced within the pending suit are closely and substantially related to the subject-matter included within an area of my previous representation of NFO."

Petitioner's contention that the subject-matter of the pending action is unrelated to his prior employment is unique in one respect. There is nothing unusual in a contention by an attorney who formerly represented a party against whom he subsequently attempts to proceed, as the representative of an adverse party, that the matters involved in the former employment were not substantially related to the subject-matter of the new proceeding. That claim appears to have been made in almost every case where the question of disqualification has arisen. In this case, however, it is undisputed that during the period of his former employment petitioner engaged in legal activities with respect to respondent's matters which were not only directly and substantially related to the subject-matter of the pending action, but were in fact the identical matters, and that he not only counseled and advised respondent with respect to such matters, but submitted a bill for his services which was paid. His basic contention seems to be that such activities were not services rendered as an attorney for respondent because the work was done on his own initiative without any request from respondent, and his advice, although paid for, was not followed. Consequently,

he insists that no relation of attorney and client ever existed with respect to such services.

Even on his version of the facts such a conclusion is untenable. Neither the question of whether the work was done on his initiative, or whether his advice was followed, or a combination of the two, can constitute a proper test of whether petitioner was acting as an attorney for the client, in giving the opinion and advice. One of the principal policy reasons for protecting the confidential relation of attorney and client is to encourage complete freedom of discussion of the client's problems. It was once said by former Chief Justice Taft:

> "It is essential for the proper presentation of the client's cause that he should be able to talk freely to his counsel without fear of disclosure." (Drinker, Legal Ethics, p. 135, quoting from W. H. Taft, Ethics in Service (1915).)

There is no principle of law that compels a client to agree to or accept his attorney's advice, and any recognition of a principle that a lawyer is free to accept adverse employment with reference to a particular matter if his legal advice is not followed, would not only put improper pressure upon the client to follow the advice even though it disagreed with it, but would tend to impair the policy of encouraging free discussion. Nor can the question of who initiated the legal and factual research upon which the subsequent dicussion and advice is based be of consequence, especially where the lawyer is at the time general counsel for the client (Cf. *Chugach Electric Assn.* v. *U. S. D. C. Alaska,* 9 Cir. 1966, 370 F. 2d 441, rev. denied Oct. 9, 1967, No. 132, *Roderick* v. *Chugach Electric Assn.,* U. S. Sup.), bills it for the specific services, and is paid therefor. The question of whether petitioner could be heard to make such a contention even on his own version of the facts, is, however, purely academic in this case because as shown by

respondent's "Statement of the Case" supported by record references, there is abundant evidence in the record sustaining the successive findings of the District Court and the Court of Appeals that petitioner's representation of respondent included specific matters closely and substantially related to the subject-matter of the pending action.

A Finding Concurred in by Both Courts Below Will Be Accepted by This Court Unless Shown To Be Clearly Erroneous.

In some respects the evidence was in conflict. The only conflict with respect to the matters embraced within his former employment was created by statements of petitioner himself, some of which were verified, and some of which were merely made in briefs and argument and repeated in his Petition for Certiorari as established facts. None of the affidavits of others filed by him in opposition to the motion to disqualify, purport to cover the circumstances of petitioner's legal research with respect to matters involved in the pending case. Resolution of any conflict in the evidence was in the first instance the function of the District Court, and it determined from the record before it that petitioner was disqualified. The opinion of the Court of Appeals clearly went beyond a mere determination of whether there was evidence supporting such determination. It said:

> "* * * the record before the District Court *having disclosed* that the matters embraced within the pending suit are closely and substantially related to a subject-matter included within the petitioner's previous representation of National Farmers Organization, Incorporated."

It has long been the rule of this Court that where both courts below have concurred in the finding on successive examinations of the evidence it will be accepted in this

Court unless shown to be clearly erroneous. *Road Dist.* v. *Mo. Pac. R. R. Co.* (1927), 274 US 188, 191; *Norton* v. *Larney* (1925), 266 US 511, 518. Application of that principle here renders further discussion of what petitioner asserts to be the first question presented, superfluous. What petitioner is obviously attempting to do is to have this Court weigh the evidence *de novo,* on the basis of arguments which were made in the District Court and the Court of Appeals, and rejected by both. He has presented nothing which by any stretch of the imagination amounts to a showing that the findings of the courts below were clearly erroneous. A question depending upon obtaining a *de novo* determination of the facts by this Court is scarcely the type of question which this Court considers under Rule 19 as a ground for certiorari.

Petitioner's Version of the Facts Is Refuted by His Documentary Admissions.

Even if all of respondent's other evidence were disregarded, petitioner's version of the facts is clearly and conclusively refuted by admissions in his own documents. The affidavits of respondent's representatives state that Hall's activities in connection with the questions involved with respect to the master contracts began with, and resulted from, an assignment to look into and give an opinion with respect to the legal aspects of a grain memorandum, which respondent's Grain Department was proposing to issue. While petitioner now denies this, it is clearly admitted in his "resignation letter" of November 10, 1965 (*ante* p. 13), as well as other documents for which he is responsible. That letter was written only seven weeks after the meeting at which he presented his material and views to the executive committee, and his recollection of the events preceding it should have been clear at that time. By his own unequivocal admission, his research into the matters

involved in this action commenced with his assignment to check into certain legal phases of the grain memorandum and all of such research was a part of that assignment.

"*After completing this assignment*" he "reported to Mr. Staley and the Executive Committee" with respect to all of the matters which are the subject-matter of the pending action. It is significant that he then said "I do not want it said that the disaster I feel is coming was caused as a result of my failure *to give them proper legal guidance.*" The letter is consistent with, and explanatory of, the form of his billing for his research as "*Grain matter, contracts, etc.*" In an attempt to explain his letter in a manner consistent with his present version, petitioner now says [P. 17]:

> "It is asserted my resignation letter shows it was through specific employment on the Grain memo which led me to researching the subject-matter of this suit. I will concede to an *inaccurate use of words,* but under the circumstances I was not prone to dwell in great detail on the strict order of all the many, many events in my resignation letter. There was no reason to. The very first sentence, however, actually shows the limits of my *extra* employment and other documents in the record prove this to be the case."

In *Cord* v. *Smith* (9 Cir. 1964), 338 F. 2d 516, 523, the court said:

> "The remaining question is, was he acting as Cord's attorney? In 1934 Young claimed that what he did for Cord in connection with the Los Angeles Broadcasting Company was done by him as Cord's attorney and he sued Cord on that basis. We do not think that *it lies in the mouth of a lawyer, who has made such allegations* under oath in an action against his client, to say years later, *when it suits his interest to do so, that the allegations mean something else and that he was not acting as a lawyer.*"

While petitioner was not under oath at the time he wrote the "resignation letter", and his bill for services was paid, the same considerations should be equally applicable to his attempt to say, when it suits his interest to do so, that his prior statements, even though unsworn, that he was acting as a lawyer for his former client in rendering the services, mean something else, and that he was not acting as attorney for respondent in rendering the services for which he billed and was paid. Petitioner does not even attempt to point out what he now claims to have been an inaccurate use of words in the letter.

Petitioner apparently also claims (P. 17) that because the letter states only that he was directed to look into certain phases of a grain matter, and does not say specifically that he was directed to go into the other matters, which he says the assignment led him into, his additional research should not be considered to have been rendered as an attorney for respondent because he was only employed specifically to look into the grain matter. But whether he was specifically directed to make all of the research his "assignment" led him into, is immaterial. It is the function of the attorney to determine what research is necessary to carry out an assignment by his client, and petitioner's own conception of the scope of his assignment is so clearly stated in the letter that it cannot be in doubt.

His conception of his own obligation at the time is further shown by his statement in his letter of December 20, 1965, to Sinclair [R. 93 (118)]:

> "I know that in your position *as new chief counsel* for N. F. O., it is not only your right but your *duty* to learn as much as you can on these problems."

Petitioner also insists that his own statement of the scope of his assignment should be disregarded because the Court should know judicially that if he had not commened

his research prior to the assignment with respect to the grain matters, he would have had insufficient time to complete it. But the claim that the research *preceded* the assignment which his letter states led him into it, was never made until long after the termination of his employment.

If it is a matter of any consequence further confirmation of his statement as to when and why the work was done appears in his letter to the Legal Ethics Committee of the Indiana State Bar Association dated July 6, 1966 [R. 93 (163)] which he has not attempted to explain. He said:

> "I should add that the President of NFO asked me while I was counsel for NFO to give him an opinion with regard to a tax question. (The 'resignation letter' said: 'I was asked to check into *certain legal phases* of a *grain memorandum, along with the tax implications.') In the process of answering this tax question and with concern for other matters involved,* I did come up with the problems that I found to exist and what I thought should be done to correct them while there was still time. I presented NFO with a bill for these services and they were paid. I submitted approximately 167 pages of rough research with these viewpoints, notes and cases to the officers of NFO."

The genesis of petitioner's claim of independent research unconnected with his employment appears in the correspondence file of the Legal Ethics Committee of the Indiana State Bar Association. On July 22, 1966, the Counsel for the State Bar Association wrote the Chairman of the Legal Ethics Committee stating that he had had a three-hour conference with petitioner and had been shown his entire file [R. 93 (172)]. The letter states in part.

> "While preparing *to defend the suits against the NFO* Mr. Hall discovered defects in the organizational structure and in the contracts of the NFO which he believed violate several federal laws, including antitrust laws.

> "Mr. Hall *on his own,* prepared a detailed memorandum, outlining the illegalities and suggesting ways to eliminate them. The officers of the NFO told Mr. Hall that this was none of his business, and that he should proceed with defending the holding actions. The letter of August 21, 1965, referred to above [R. 93 (81)] substantiates this. However, Mr. Hall did bill *the NFO officers* for his time in preparing the memorandum, and was paid therefor."

That version later appeared in the Committee's opinion to Hall [R. 72-92 (167-168)], but is obviously not substantiated either by the letter referred to [R. 93 (99-101), *ante* p. 11], or by any other document in the record, and is directly contrary to Hall's own statements in his prior letter requesting the opinion from the Indiana State Bar Association [R. 93 (163)], as well as in his "resignation letter" of November 10, 1965. Petitioner, himself, has insisted throughout this litigation that his research had no connection with the defense of the holding actions, and has never claimed, and does not now claim that it arose out of his preparation to defend the holding actions, as assumed in the opinion given by the Legal Ethics Committee [R. 72-92 (167)].

In *Fleischer* v. *A. A. P. Inc.* (S. D. N. Y. 1958), 163 F. Supp. 548, 553, it is said that while the former client has the burden of showing that there is a "substantial relationship" between the issues in the present case and the subject-matter of the former representation:

> "Only where it is clearly discernible that issues involved in a current case *do not relate* to matters in which the attorney formerly represented the adverse party will the attorney's present relation be treated as measuring up to the standard of legal ethics."

In the light of the foregoing, the finding of the District Court and the Court of Appeals is not only not clearly erroneous, but is the only finding which could properly have

been made on the record. There is no merit in petitioner's contention that the matters embraced within the pending suit were not closely and substantially related to the subject-matter included within an area of his previous representation of respondent.

B. SECOND ALLEGED QUESTION.

Petioner's second alleged question is in substance whether, assuming that the finding that the matters embraced within the pending suit are substantially related to the subject-matter of his previous representation of respondent was correct, the Court of Appeals was nevertheless in error in holding the rationale of *Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.*, 2 Cir. 1954, 216 F. 2d 920; *Cord* v. *Smith*, 9 Cir. 1964, 338 F. 2d 516; and *T. C. Theatres Corp.* v. *Warner Bros. Pictures, Inc.*, D. C. S. D. N. Y. 1953, 113 F. Supp. 265, dispositive of the controlling issue presented for determination. Petitioner's argument on the alleged second question is twofold. First he purports to find various factual differences between those cases and the present case (P. 21-25), which he claims serve to distinguish it. Second, he urges that his employment as attorney for the plaintiffs in the pending action should not be regarded as adverse to respondent.

Applicability of the Rationale of the Cases Cited by the Court of Appeals Does Not Depend Upon Factual Similarities.

With respect to his first contention, the issue here is not whether there are factual differences or similarities between this case and the cases cited by the Court of Appeals, but whether their *rationale* is applicable to the facts in this case. Since the adoption of the Canons of Professional Ethics of The American Bar Association in 1908,

and their later amendments, the controlling legal principles applied in the federal courts with respect to subsequent representation of an interest adverse to a former client, have been based upon judicial construction of Canons 6 and 37 with respect to the principles implicit in those canons. Canon 6, one of the original canons, provides that the obligation of a lawyer to represent his client with undivided fidelity and not to divulge his secrets or confidences, forbids the subsequent acceptance of employment from others in matters affecting any interest of the client with respect to which confidence has been reposed. That Canon refers to *two distinct obligations* which forbid the acceptance of subsequent adverse employment (a) *the obligation to represent the client with undivided loyalty,* and (b) the duty not to divulge the client's secrets or confidences.

Canon 37, added by later amendment, is an elaboration of Canon 6 with respect to the second obligation. It provides that it is the duty of the lawyer to preserve the client's confidences, that the duty outlasts the employment, and that a lawyer should not accept employment which involves or may involve use of those confidences, either for his own private advantage, or the disadvantage of his client, without his knowledge and consent, even though there are other available sources of such information.

While the underlying principles go back to the common law and were recognized in the federal courts before the adoption of the canons (*In re Boone,* 83 F. 944, N. D. Cal. 1897), the modern more precise application of their necessarily general language to particular situations actually began in *T. C. Theatre Corp.* v. *Warner Bros. Pictures* (D. C. S. D. N. Y. 1953), 113 F. Supp. 265, where the following principles were laid down:

1. Where any substantial relationship is shown between the subject-matter of a former representation and that of

a subsequent adverse representation, the latter will be prohibited without more.

2. Where such a showing is made, the court will assume the receipt of confidential information without inquiry into its nature and extent because to require the client to show such matters and their possible value to the new client would itself destroy the protection of their relationship.

It has also been said that a showing of the substantial relation creates an "irrebuttable inference" that confidential information material and relevant to the subsequent case was given to the attorney under such circumstances (*Fleischer* v. *A. A. P. Inc.* (S. D. N. Y. 1958), 163 F. Supp. 548, 552) and to the same effect, that the rule prohibiting subsequent representation in a matter arising out of or closely related to the subject-matter of the former employment does not depend for its operation upon a subsidiary decision as to whether the challenged attorney would or might be using or misusing confidential information (*Cord* v. *Smith* (9 Cir. 1964), 338 F. 2d 516, 524).

The principles stated in the *T. C. Theatres Corp.* case were subsequently considered and approved by the Court of Appeals for the Second Circuit in *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.* (2 Cir. 1954), 216 F. 2d 920. In the latter case it was said that the courts throughout the country which have incorporated the canons into their rules of court were primarily concerned for the public good which was deemed to require assurances, as specific as possible, of the confidence inherent in the client-attorney relationship, and that while it was doubtless considered desirable that the Bar should have, in convenient form, a code of professional ethics for its guidance, the Canons must be viewed not as a Bill of Rights for the Bar, but, rather, a codification of the more important limitations on legal practice broadly deemed necessary for the protection of the clients (p. 926).

It has also been recognized that the courts in such matters have a duty over and above that of counsel to see that the good name of the Bar and of the administration of the law are upheld, and that disqualification should be ordered where the circumstances are such that to permit the lawyer for the adverse party to remain in the case would inevitably lead to suspicion and distrust in the minds of his former clients, and would afford an opportunity for misunderstanding on the part of the public which would lead to a lack of confidence in the Bar.

> *W. E. Bassett Co.* v. *H. C. Cook Company* (D. Conn. 1961), 201 F. Supp. 821, 825 aff. on opinion of District Court (2 Cir. 1962), 302 F. 2d 268;
>
> *Empire Linotype School* v. *U. S.* (S. D. N. Y. 1956), 143 F. Supp. 627, 631.

In *Cord* v. *Smith* (9 Cir. 1964), 338 F. 2d 516, 524, it was urged that certain decisions of the courts of California would permit an attorney to serve an adverse interest in a subsequent proceeding even though the subject-matter of the later action was substantially related to his former employment, if no confidential communications were shown to be involved. The court said:

> "Young asserts that in dealing with Smith he was authorized by Cord to communicate with Smith, that therefore there are no confidential communications involved, and that the rule against representing conflicting interests applies only in cases where confidential communications are involved. He cites certain California cases which he says sustain his proposition. (Two of such cases, hereinafter discussed, are relied on by petitioner here.) If they do sustain it, we decline to follow them. * * * *When an attorney appears before a federal court, he is acting as an officer of that court, and it is that court which must judge his conduct.*

"In our opinion, the rule that an attorney who has represented one party in a transaction may not thereafter represent the other party in an action against his former client, arising out of or closely relating to the transaction, does not depend for its operation upon a subsidiary decision as to whether the attorney would or might be using or misusing confidential information derived from his former client. We think that the famous words of Judge Cardozo in *Meinhard* v. *Salmon,* 1928, 249 N. Y. 458, 464, 164 N. E. 545, 546, 62 A. L. R. 1, in which he was defining the duties of a trustee, *are equally applicable to an attorney-at-law in relation to his conduct in the federal courts:* 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.'"

The foregoing principles constitute the rationale of the decisions held by the Court of Appeals in this case to be dispositive of the issue, once the conclusion has been reached that the matters embraced within the pending suit are closely and substantially related to a subject-matter included within the previous representation of the former client. No Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals with respect to that rationale. Its applicability in no way depends upon fine distinctions as to the particular nature of the circumstances under which the prior legal services related to the subject-matter of the pending proceeding

were rendered, or the particular type of subsequent adverse proceeding in which the issue is raised. Once the relation is found to exist, disqualification must inevitably follow:

In *U. S.* v. *Trafficante* (5 Cir. 1964), 328 F. 2d 117, 120, the court said:

> "The Preamble to the Canons of Ethics admonishes the members of the bar that their conduct should be such as to merit the approval of all good men. That conduct should not be weighed with hair-splitting nicety. We have found no exceptions to the exhortation to 'abstain from all appearance of evil.' 1 Thessalonians 5:22."

Petitioner's contention that the rationale of the cited cases does not apply because of the factual differences he purports to find is clearly without merit.

Petitioner's Representation of Plaintiffs in the Pending Action Was Adverse to Respondent.

Petitioner's contention that the rationale of the cases cited by the Court of Appeals is inapplicable because his representation of the plaintiffs in the pending action should not be considered adverse to respondent (pp. 25-27) is equally without merit. In connection with this contention, he purports to quote without any context a statement from a document that is not only not in the record, but which the petitioner states to bear the date of July 22, 1967, which was actually after the denial of his petition for rehearing (p. 25, App. II, p. 3a). The president of NFO is quoted as saying: "It's going to take the support of the members because NFO is the members." From this statement petitioner concludes that in formerly representing NFO as its attorney he was actually representing the members, and that his present employment is not adverse to his former client because he also represented the same members in

commencing the pending action. This is obviously sheer sophistry.

The petitioner represents five members (originally six) in the pending litigation. No other member has become a plaintiff, although one has withdrawn. The complaint alleges that plaintiffs and all other members of NFO similarly situated, have common questions made the subject of the action, the answers to which are equally applicable to all members [R. 5-21 (7)]. Respondent's answer alleges that while any determination of the questions plaintiffs seek to have decided, would as a matter of law affect all members, the interest of plaintiffs in seeking to have respondent's contracts adjudged invalid is not common to all other members or to any substantial proportion of respondent's membership [R. 22-42 (3)]. Plaintiffs' reply [R. 43-64 (1, 2)] alleges that "plaintiffs are without sufficient information to know whether the interests of plaintiffs are common to all other members or to any substantial proportion of defendant's members since the defendant keeps its membership secret. Defendant's total membership, however, is not wanted by the plaintiffs in this action as it is not necessary or material to the issues in this case * * * Plaintiffs only alleged that the questions made the subject of this action are common to all members in that it applies to all members."

On the face of the record therefore petitioner's claim that he is representing "the same members" in the pending action whose interests he represented while counsel for NFO is a palpable absurdity. It is undisputed that his former employment was by respondent, that he was paid by respondent, and that in that employment he represented respondent, not the individual members. Respondent is the legal representative in the pending proceeding of the members other than the dissident members, and there is no basis for the argument that the interests of the latter are

not adverse to respondent. Otherwise the pending action could not even be a justiciable controversy. As a matter of constitutional necessity a declaratory judgment action must involve the legal relations of persons having *adverse* legal interests and must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character. *Aetna Life Ins. Co.* v. *Haworth* (1937), 300 U. S. 227, 240, 241.

The applicable principle in suits of stockholders against their corporation which would present essentially the same issue, was stated by this Court in *Smith* v. *Sperling* (1957), 354 U. S. 91, 95, to be:

> "There is antagonism whenever the management is aligned against the stockholder and defends a course of conduct which he attacks."

The proceeding in which petitioner was disqualified seeks to have declared invalid respondent's contracts with processors which it has negotiated over a period of years, and to enjoin it from further efforts to bargain on behalf of its members which is the function for which it exists. If this should be accomplished, respondent would become a mere shell, and the complaint so recognizes by seeking in the third paragraph of complaint a determination as to how its assets should be disposed of in the event the plaintiffs are successful. In essence the plaintiffs seek to destroy respondent under the guise of acting for its own good.

Whether the subsequent proceeding is contrary to the best interests of the former client or for its benefit, is not a matter to be left to the determination of an attorney who is seeking to justify his representation of the adverse party in the subsequent proceeding. The respondent is entitled to make its own determination of what constitutes the best interest of the members whom it represents, and

as shown by the pleadings, it has determined that their best interest requires resistance to the claims asserted in the pending action.

Jaccuzzi v. *Jaccuzzi Brothers, Inc.* (1963), 218 Cal. App. 2d 24, 32 Cal. Rptr. 188, is cited by petitioner in support of his contention that the rationale found applicable by the Court of Appeals is inapplicable here because this action is for respondent's benefit and not adverse to its interests. That was a derivative action by minority stockholders to recover for the benefit of the corporation property and assets claimed to have been improperly transferred for an inadequate consideration. The rule stated was:

> "Where, as here, minority shareholders bring an action against the corporation *and its directors,* seeking redress for *alleged misfeasance in office, on the part of the directors,* a former attorney for the corporation is not disqualified from representing the shareholders in such action unless there is some showing that in so doing the attorney may be called upon to breach a professional confidence previously entrusted to him by his former client."

In support the court cited *Meehan* v. *Hopps* (1956), 144 Cal. App. 2d 284, 290, 301 P. 2d 10, where it was said that when a controversy arises between an *attorney's corporate client* and *one of its directors,* it would be a sorry state of affairs if he could not use on behalf of his client, information which that officer was required by reason of his position with the corporation to give to the attorney. In *Cord* v. *Smith,* 338 F. 2d 524, n. 6, the court said with respect to those cases:

> "*Jaccuzzi* v. *Jaccuzzi Bros. Inc.,* 1963, 218 Cal. App. 2d 24, 32 Cal. Rptr. 188, and *Meehan* v. *Hopps,* 1956, 144 Cal. App. 2d 284, 301 P. 2d 10, were cases in which attorneys for a corporation filed actions against officers and directors for wrongs to the corporation, and were permitted to do so. We need not decide whether we would follow them."

Nor is such a decision required here. This is neither an action to recover assets for the corporation nor an action by the corporation against officers and directors for wrongs to the corporation and the rule applicable in such actions has no application here.

There is no merit in petitioner's contention that the District Court and the Court of Appeals erred in holding the rationale of the cases cited in the Court of Appeals opinion dispositive of the controlling issue in this case, in the light of the finding of both courts that the record in this proceeding discloses that the matters embraced within the pending suit are closely and substantially related to a subject-matter included within petitioner's previous representation of respondent.

C. THIRD ALLEGED QUESTION.

Petitioner further contends that, admitting that the matters involved in the pending action are substantially related to the subject-matter of his former employment by respondent, the rationale of the cases cited by the Court of Appeals is inapplicable because "Wrongdoing, fraud, misrepresentation, proven concealment of material facts and information from the members, and other illegality appear, even on the face of the record" (p. 27). His contention is that where fraud is involved, there is an exception to the attorney client privilege, and that where no privilege exists, the principle requiring disqualification because of a substantial relation between the subject-matter of the former employment and the matters involved in the pending action, does not apply.

The Record Shows That Petitioner's Claim of Fraud Is an Afterthought Devised for the Purpose of Attempting to Evade the Rationale Requiring Disqualification.

The record shows clearly that while the petitioner has contended repeatedly since July or early August of 1965, that the master contracts are illegal for the reasons alleged in the complaint, and has further contended that, contrary to the expectation of the members, respondent's legal structure will prevent them from receiving any part of the 5% payments to be made under the processor contracts, if, contrary to his contention in the pending case, such payments are not in violation of the Robinson-Patman Act, the claim of fraud was not made until after respondent's motion to disqualify was filed. It is plain from the record, that the claim is an afterthought devised for the sole purpose of attempting to escape disqualification.

No charge of fraud is made in the complaint, and no such charge is conceivably material to any of the asserted claims of illegality of the master contracts. The specific claim of fraud first asserted in the District Court after the disqualification motion was filed, and subsequently in the Court of Appeals, was that the members of NFO have been led by respondent's officers, agents, and employees to believe that the balance of the 5% received from the processors in payment of services, not required to be expended by respondent's board of directors in promoting the sale of the particular commodity, can be distributed to them, whereas petitioner contends that such disposition is precluded by the Iowa statute under which respondent is organized, and its own articles of incorporation. The alleged fraud is claimed to lie in respondent's failure to disclose to the members what petitioner claims to be the legal restrictions in the statute and articles of incorporation preventing such distribution [R. 72-92 (12, 13), 98-108, 43-64 (18, 19)].

Petitioner's resignation letter of November 10, 1965, stated as one of the matters which he had reported to the Executive Committee after completing his assignment "the 5% which members I have talked to expect a return of when the master contracts are activated cannot be returned to them" (*ante,* p. 14). But he also said: "Notwithstanding my record of success for NFO there is a *sharp disagreement* between us as to NFO's legal status." Obviously there is a vast difference between a legal disagreement and fraud.

In petitioner's subsequent letter to Mr. Sinclair as his successor chief counsel, he said with respect to the same matter [R. 93 (120)]:

> "Throughout my travels for N. F. O. over the country, I have talked with many, many members and organizers concerning their impression of what will be done with the 5% check-off coming to N. F. O. from the processors once master contracts are activated. In every instance they felt this 5% would be returned to them, and they would realize a 2% price advantage over non-members because of N. F. O. I feel these people are being misled because *in my opinion* this cannot be done. In support of what I have just said, I call your attention to Section 504.10 of the statute under which N. F. O. was incorporated. It reads as follows:
>
> > " 'No dividend or distribution of property among the stockholders shall be made until the dissolution of the corporation.'
>
> "Some might say this section of the statute does not apply to N. F. O. since the key word is 'stockholders' and N. F. O. has only 'members'. However, it becomes quite apparent this line of reasoning is wholly without merit when Article Nine of N. F. O.'s own Artciles of Incorporation are read. It states:
>
> > " 'No dividend or distribution of the property of this corporation shall ever be made among the

officers or members of this corporation until dissolution . . .'"

In the same letter, he said:

"I know you must first decide *if the matters I have raised have merit,* and *if so* what must be done to correct them."

In replying Mr. Sinclair stated that he had consulted with attorneys in the Federal Trade Commission and that in their view the 5% provision did not violate the Robinson-Patman Act, and he had so advised the directors. He also said in part [R. 93 (140)]:

"However there are other questions discussed by you which are just as important to consider and as to those we must address ourselves * * *

"It is only by testing these problems and studying them from all angles that we can determine *how real they are* and what the solution might be *if they are real.*"

No claim of fraud was made in Hall's letter of July 6, 1966, requesting the opinion of the Legal Ethics Committee. He said [R. 93 (164)]:

"There is a definite serious question involving a construction of the statute under which NFO was incorporated, particularly since NFO embarked upon the collective bargaining program approximately two years after it was incorporated. *If I am correct* and the NFO master contract is activated, it is entirely probable, *in my opinion,* that the millions and millions of dollars that will be flowing into NFO coffers will eventually escheat to the State of Iowa."

It was not until petitioner filed his answer to the motion to disqualify [R. 72-92 (12, 13)], that what he had previously termed a legal disagreement, became the basis for a charge of fraud. The charge was repeated in a document filed by petitioner shortly after the first hearing on the mo-

tion [R. 2], entitled "Special Pleadings As To Why Plaintiffs' Counsel Should Not Be Disqualified" [R. 98-108]. He also attempted to inject the issue into the pending action in a reply to respondent's answer to the complaint filed more than two months after the first hearing on the motion [R. 2, 43-64 (18, 19)].

No Inference of Fraud Is Either Compelled by or Properly Inferrable From the Record.

In the Petition for Certiorari (36, 37), petitioner also appears to be contending that in addition to his previous claim of fraud the Robinson-Patman question presented in the pending case has so long been settled that it is fraud even to assert a contrary position. Cases are cited which petitioner insists are so conclusive that the question cannot be considered a valid justiciable issue.

Even petitioner appears to realize the impropriety of such a claim in this proceeding. The issues in the pending action must, of course, be decided initially by the District Court. Their consideration in this proceeding is, as previously stated, limited to a determination of whether they are related to a subject-matter of petitioner's former representation of respondent. But in view of the claim of fraud with respect to the Robinson-Patman question, respondent feels that it must point out briefly the reasons it considers the authorities relied on by petitioner irrelevant.

Under the principles announced by this Court in *Sunkist* v. *Winckler & Smith Citrus Products Co.* (1962), 370 US 19, 29, respondent and its members collectively must be considered a single legal entity for purposes of the Clayton and Capper-Volstead Act. Section 2 of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act, including 15 U. S. C. § 13(c), is a part of the antitrust laws of the United States. *Nashville Milk Co.* v. *Carnation Milk*

Co. (1958), 355 US 373, 376, 377. And since, for the purposes of the antitrust laws, respondent cannot be considered a legal entity separate and apart from its members, it cannot for such purposes be considered their agent, representative, or other intermediary acting on behalf of or subject to their control within the meaning of 15 U. S. C. § 13(c). It necessarily follows that the payments to be made for services are, for the purposes of the statute, payments by the processors as buyers, to the sellers, which are stated to be for services to be rendered.

All of the policy purposes of Section 13(c) involve payments of sellers to buyer or price concessions of sellers by which buyers benefit (*F. T. C.* v. *Broch & Co.* (1960), 363 US 166, 171, 174), and there has apparently been no case involving the application of Sect. 13(c) to payments by buyers. Moreover, all of the provisions of 15 U. S. C. § 13, with the single exception of (c) relate to discriminations by sellers in favor of buyers, and there is not the slightest suggestion in the *Broch* case or any other that payments or price concessions by buyers to sellers either involve or can involve any of the evils which the Act was designed to remedy. But, in any event, the controlling tests with respect to the legality of payments by buyers to sellers cannot be more stringent than those applicable to the legality of payments by sellers to buyers. With respect to the legality of the latter, regardless of earlier decisions, it must now be considered as settled by *Empire Rayon Yarn Co.* v. *American Viscose Corporation et al.* (2 Cir. 1966), 364 F. 2d 491, cert. den. 385 US 1002 (1967), that whether payments or price concessions of sellers to buyers violate 2(c) depends on the circumstances of each case and that under appropriate circumstances services rendered to a seller by a buyer may justify payments or grants of price concessions by the seller.

The final decision in the *Empire Rayon* case was made

upon a rehearing *in banc.* Originally the court by a two to one majority had decided that price concessions of the seller involved there violated the statute (354 F. 2d 182). On rehearing the dissenting opinion to the contrary (354 F. 2d 188 *et seq.*) was adopted as the majority opinion (364 F. 2d at p. 492. The final opinion shows that by reason of the importance of the question, the Federal Trade Commission was requested to and did submit a brief (364 F. 2d at p. 492). In the brief filed, the Commission said in part:

> "The crucial question in every case brought under Section 2(c) is whether the buyer is receiving preferential treatment effected through the payment of 'brokerage, or other compensation, or any allowance in lieu thereof.' The answer requires the resolution of a question of fact and must be determined under all the circumstances prevailing in each case."

The test adopted in *Empire Rayon* is one of "purpose and effect," to be determined as a fact issue in each case.

Respondent's answer in the pending action denies that the 5% payments will constitute receipt or acceptance of anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, except as compensation for services rendered to said processors by respondent and its members collectively as a single entity, and alleges that the value of the services to the processors required to be rendered under said contracts will equal or exceed the amount agreed to be paid therefor. Under the foregoing principles these allegations if made with respect to payments by a seller to a buyer, would present a fact issue as to purpose and effect. In such a determination, labels used by the parties are not controlling, *Edward Joseph Hruby* (1962), 61 F. T. C. 1437, and even though payments by buyers to sellers are within the language, but not the announced purposes of 15

U. S. C. Sect. 13(c), such payments under the foregoing principle cannot be held illegal unless they fail to satisfy the "purpose and effect" test.

Whether respondent is right or wrong is a question which the District Court must decide in the first instance. But obvlously there is no basis for petitioner's contention that no valid justiciable issue is presented with respect to the Robinson-Patman claim and that fraud is therefore inferrible on the face of the record.

Petitioner's contention that the record on its face establishes fraud of respondent with respect to the disposition of the balance of the 5% to be paid by the processors, after deduction of the portion to be used by NFO to promote the sale of the particular commodity involved, is equally untenable. His contention since the filing of the motion to disqualify has been that his legal position as to the effect of the Iowa statute and respondent's articles of incorporation is so obviously correct that there can be no basis for a good-faith contention to the contrary. But regardless of the extent to which they restrict the payment of dividends and distributions of the corporate property, they apply only to moneys and property of the corporation.

The payments in question are to be made under contracts with the processors which specifically provide the manner in which they are to be disposed of.. Under the contract provisions the disposition of such funds other than the portion to be expended to promote the sale of the commodity is to be determined not by the NFO management, but by a special national convention of its members to be held prior to the ratification of the first NFO contract. Any uses of such funds for NFO purposes or for any purposes, other than in accordance with the disposition determined by the members at the special national convention would be in violation of the contract. On the other hand there is no restriction in the contract as to the character of disposi-

tion which can be made by the members. There is no principle of law which would prohibit the payment of such funds to NFO under a contract limiting their use to a special purpose. While the analogy is not perfect a deposit of funds in a bank for an agreed special purpose is somewhat analogous. The general rule applicable to such a situation is that a delivery of money or property to a bank for application to a special purpose, while not strictly a "special" deposit as that term is usually employed, partakes of the nature of a special deposit in that the bank becomes an agent, bailee, or trustee and does not take title to the funds (9 C. J. S. p. 570). The character of such a payment is a question of fact to be determined from the purpose for which it was made, the relationship between the parties to the agreement and their intention, as expressed therein, and as revealed by the facts and circumstances of the case. 9 C. J. S. p. 565. This is the rule of the Iowa courts. In *Andrew* v. *Security Trust & Savings Bank* (1942), 214 Ia. 1199, 243 NW 542, 545, where it is said with respect to a deposit for a special purpose:

> "The meaning and effect of a contract, and the rights of the parties to it, are to be determined from their intention as evidenced by what they say and do and all that they say or do at the time and by their course of business (barring, of course, rules of evidence such as the parol evidence rule and statute of frauds, none of which is involved here). The name or designation which the parties see fit to give to the transaction or to their relationship is not conclusive. 'In determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties'."

See also *Hudspeth et al.* v. *Union Trust and Savings Bank* (1923), 196 Ia. 706, 195 N. W. 378.

In *Sindlinger* v. *Department of Financial Institutions* (1936), 210 Ind. 83, 84, it was said:

> "It has been many times held by this court that a bank deposit may be made subject to any legal agreement which the depositor and the bank may make concerning it, so long as it does not injuriously affect the rights of innocent third persons * * *
>
> "A literal or technical construction of an isolated or special clause should not be indulged to defeat the true meaning of a contract. The true meaning of a contract is to be ascertained from a consideration of all its provisions in order to carry out the true intention of the parties gathered from the whole instrument."

Petitioner's contention completely overlooks the contractual provision under which the payments are to be made and assumes that any distribution thereof would constitute either the payments of dividends by respondent, or the distribution of its property. But whether the payments become its property under the contract is the threshold question that would have to be decided before the applicability of the provisions of the Iowa statute or the articles of incorporation could arise. That question should be, and obviously is a question of state law which should only be decided when and if it is presented in an appropriate proceeding rather than as a pretext for evading the application of the rationale of the cases which the Court of Appeals held dispositive. Regardless of whether respondent is right or wrong in what petitioner formerly referred to as legal disagreement, there is no basis for his contention that fraud either appears on the face of the record or is inferrable. Consequently, the claimed exception to the rationale held applicable by the Court of Appeals has no factual basis in the record even if it existed.

The Duty Not to Accept Adverse Employment Goes Beyond the Duty Not to Disclose Confidential Information.

Even in a case actually involving fraud under circumstances where the former attorney would be released from the privilege, petitioner is in error in assuming that an exception to the rule requiring disqualification from subsequent adverse representation is thereby created. Canon 37 provides two exceptions with respect to the prohibition against disclosure of confidential information. The first is that if a lawyer is accused by his client he is not precluded from disclosing the truth with respect to the accusation. The second is that the announced intention of a client to commit a crime is not included within the confidences a lawyer is bound to respect, and he may properly make such *disclosures* as may be necessary to prevent the act or protect those against whom it is threatened. Drinker in his work on Legal Ethics (p. 137), states that disclosure may be made to prevent fraud as well as the commission of a crime although he says that where a fraud is merely possible, but not clear, the lawyer should simply withdraw. However, neither stated exception goes beyond relieving the lawyer from his obligation to preserve the client's confidences with respect to the particular matter, under the particular circumstances specified, and there is no implication in the canons that whenever an exception to the privilege is found to exist, a lawyer is free to accept employment adverse to the former client, which he would otherwise have been disqualified from accepting.

Petitioner contends that *Croce* v. *Superior Court*, 1937, 21 Cal. App. 2d 18, 68 P. 2d 369, states the controlling principle. That was a case where litigation arose between several parties with respect to a transaction in which all were represented by the same attorney. The court held that in such a situation no communications between the

attorney and the clients *inter sese* are privileged, and said that while no cases precisely in point had been found it would seem to follow that if the attorney was not disqualified as an adverse witness he was not disqualified from serving as an adverse attorney. A few other cases have held the same way where the same situation was involved, but no case has been found where the general statement in the *Croce* case has been extended to any other situation.

On the contrary, in *Cord* v. *Smith* (9 Cir. 1964), 338 F. 2d 516, 524, where the contention was made that the rule against representing conflicting interests does not apply where no privilege with respect to confidential communications is present, the court said:

> "Young asserts that in dealing with Smith he was authorized by Cord to communicate with Smith, that therefore there are no confidential communications involved, and that the rule against representing conflicting interests applies only in cases where confidential communications are involved. He cites certain California cases which he says sustain his proposition. If they do sustain it, we decline to follow them."

In n. 6 and 7 on the same page it was said:

> "6. *Arden* v. *State Bar*, 1959, 52 Cal. 2d 310, 341 P. 2d 6; *Croce* v. *Superior Court*, 1937, 21 Cal. App. 2d 18, 68 P. 2d 369; *Petty* v. *Superior Court*, 1953, 116 Cal. App. 2d 20, 253 P. 2d 28; *Murphy* v. *Waterhouse*, 1896, 113 Cal. 467, 45 P. 896. *Murphy* does not touch the problem. *Arden*, *Croce* and *Petty* contain some language pointing in the direction that Young wants us to take. They are cases, however, in which the attorney had represented *both* parties to the former transaction. Not so here."
>
> "7. A number of California cases recognize that the obligation not to disclose confidential communications, or to use them against the client, is different from the duty not to accept subsequent adverse employment."

The rule stated in *Croce* was expressly rejected in *Packer* v. *Rapoport et al.* (N. Y. Sup. 1949), 88 N. Y. S. 2d 118, rev. on other grounds (N. Y. Sup. App. Div. 1949), 89 N. Y. S. 2d 703, but subsequently twice affirmed unanimously without opinion (N. Y. Sup. App. Div. 1950), 101 N. Y. S. 2d 936 (N. Y. Sup. App. Div. 1951), 103 N. Y. S. 2d 127. In the latter case it was asserted that there had been no confidential communications between the attorney and the former client because of the presence of a third person, and that consequently the lawyer was not disqualified from subsequent adverse representation. The court said (p. 120):

> "The plaintiff relies on *Croce* v. *Superior Court of City and County of San Francisco*, 21 Cal. App. 2d 18, 68 P. 2d 369, at page 370, decided by the District Court of Appeal of California, where the court said:
>
> "' * * * while no cases precisely in point have been cited by either side, it would seem to follow necessarily that if under the circumstances stated an attorney is not disqualified from serving as an adverse witness, it cannot be held that under the same circumstances he is disqualified from serving as an adverse attorney.'
>
> "The holding of the said court, although not binding on this court, is persuasive. For the reasons hereinafter set out, however, we are constrained to hold otherwise. The obligation of a witness and an attorney do not coincide. To hold, therefore, that an attorney may act adversely whenever he may be compelled to testify adversely *fails to give effect to the full obligation of an attorney, which is threefold.* An attorney owes *fidelity* to his client, *he owes his profession the duty not to dishonor it and he owes the administration of justice the duty not to bring it into disrepute. Hatch* v. *Fogarty*, 40 How. Prac. 492; *Baker* v. *Humphrey*, 101 U. S. 494, 502, 25 L. Ed. 1065; *In re Boone*, C. C. 83 F. 944, 952.
>
> "An attorney may not refuse to testify unless privilege is asserted. If the privilege is present, then relevant testimony will be excluded because the search for

truth is aided by recognizing the privilege based upon the relationship of attorney and client. The end result sought by this policy is a full disclosure by the client to his attorney, free of the fear that the attorney may be required to testify against him. In that manner relevant testimony is made available which otherwise might not see the light of day and the ends of justice are vindicated. Stated differently, the privilege closes the mouth of the attorney but serves to open the mouth of the client and others in possession of relevant evidence in consequence of the advice of the attorney, made feasible by a full disclosure as between the client and his attorney. *If the duty of the attorney was coextensive with the privilege, then the removal of the seal of secrecy by the client would serve to satisfy and cancel the duty owing to the client. Hatch* v. *Fogarty, Baker* v. *Humphrey,* and *In re Boone, supra,* show, however, that an attorney owes *fidelity* to his client and *the duty to preserve the honor of his profession and to promote the true administration of justice.* The *duty of fidelity to a client is violated* when an attorney places his services at the disposal of his former client's adversary in respect of matters regarding which the attorney was retained professionally. *The duties of an attorney to preserve the honor of his profession and to promote the true administration of justice are likewise violated by conduct of that kind or character.* The waiver of the privilege on the part of the client consequent on the presence of a third person *does not constitute a waiver of the duties aforesaid.* It would appear that an express waiver of such duties would be inoperative and void and contrary to public policy. *In re Boone, supra,* 83 F. at page 957."

The rule stated in the foregoing case is the only rule consistent with the rationale of the federal court decisions and the spirit of the canons. All of the foregoing obligations are recognized in the federal court decisions previously cited (*ante* pp. 29 to 32). The rule stated in the California case that when an attorney is not disqualified as an

adverse witness, he is not disqualified from serving as an adverse attorney clearly fails, as stated in the New York case, to give effect to the full obligation of an attorney, which includes in addition to his obligation not to disclose confidential matters, his obligation of fidelity to the client, the obligation to his profession not to dishonor it, and his obligation to the administration of justice not to bring it into disrepute. Even under circumstances where the former attorney would be released from the privilege in order to prevent his former client from perpetrating a crime or fraud, it does not follow that he may become the prosecuting attorney, or even the legal representative of the adverse party in civil litigation, without violating accepted standards of legal ethics.

Petitioner insists that the Court of Appeals failed to decide his claimed exception, but it necessarily rejected it in holding the rationale of the cited cases dispositive of the disqualification issue.

CONCLUSION.

As previously stated, the Court of Appeals for the Ninth Circuit said in *Cord* v. *Smith*, 338 F. 2d 516, 524, 525, that the famous words of Judge Cardozo in *Meinhard* v. *Salmon* (1928), 249 N. Y. 458, defining the duties of a trustee, are equally applicable to an attorney-at-law in relation to his conduct in the federal courts, and quoted Judge Cardozo's statement that:

> "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions * * *. Only thus has the level of conduct for fiduciaries been left at a higher level than that trodden by the crowd."

Recognition of such an exception as that urged by petitioner whenever collateral fraud is claimed by the former

attorney, or even requiring a subsidiary decision of such an issue before a former attorney can be disqualified from subsequent representation of the adverse party, would contribute substantially to the undermining of the rationale of the federal court cases by "the disintegrating erosion of particular exceptions." The decision of the Court of Appeals that the rationale of the cited cases applies notwithstanding the claimed exception was clearly right. The petition should be denied.

Respectfully submitted,

LEE D. SINCLAIR,
1730 K Street, N. W.,
Washington, D. C. 20066,

ALAN W. BOYD,
JAMES A. MCDERMOTT,
1313 Merchants Bank Building,
Indianapolis, Indiana 46204,
Attorneys for Respondent.

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis, Indiana 46204,
Of Counsel.